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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOSEPH DEONN HORNE,

Petitioner,

V.

ROBERT HOREL, WARDEN,

Respondent.

C 07-4592 SBA (PR)

OPPOSITION TO PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING

Respondent Robert Horel, Warden, Kern Valley State Prison, hereby opposes petitioner's motion for an evidentiary hearing. (See Docket entry 25.)

I. Applicable Legal Standard

When presented with a motion for an evidentiary hearing, a district court “must determine whether a factual basis exists in the record to support the petitioner’s claim.” *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999). An evidentiary hearing is required only if petitioner is able to establish a colorable claim for relief, did not fail to develop the facts surrounding his or her claim in state court, and was never given a state hearing on the claim. *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005). “In showing a colorable claim, a petitioner is ‘required to allege specific

1 facts which, if true, would entitle him to relief.”” *Earp v. Stokes*, 431 F.3d 1158, 1167 (9th Cir.
 2 2005) (quoting *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998)). Conclusory allegations, that
 3 are unsupported by specific facts, do not warrant an evidentiary hearing. *Phillips v. Woodford*, 267
 4 F.3d 966, 973 (9th Cir. 2001); *Williams v. Woodford*, 306 F.3d 665, 686 (9th Cir. 2002).

5 **II. Petitioner Has Failed To Demonstrate That An Evidentiary Hearing Is Required**

6 In his petition, petitioner claimed he was denied effective assistance of counsel in the trial
 7 court because he was required to testify in the narrative as opposed to being examined by his trial
 8 counsel. Petition, Ground One. The Constitutional standard for ineffective assistance of counsel
 9 contains two prongs: (1) whether counsel’s performance fell below an objective standard of
 10 reasonableness, under prevailing norms of practice, and (2) whether the defendant was prejudiced,
 11 in the sense that he would have received a more favorable result but for counsel’s unprofessional
 12 errors. *Strickland v. Washington*, 466 U.S. 668 (1984).

13 The reason petitioner testified in the narrative was due to an ethical obligation on the part
 14 of his trial counsel. Specifically, in a declaration submitted in the state court, petitioner’s counsel
 15 declared, “I did not present [petitioner’s] direct examination because I believed ethical reasons
 16 prevented me from doing so. The ethical reasons were my disbelief of [petitioner’s] alibi and other
 17 statements.” Answer to Petition, Ex. 6, attached Ex. 2, paragraph 3. Following discussion between
 18 petitioner, his trial counsel, and the trial judge, outside of the presence of the prosecutor, petitioner
 19 knew of his counsel’s concerns and petitioner testified against the advice of counsel. RT 3261-65,
 20 3273-74. The testimony was in the narrative.

21 In *Nix v. Whiteside*, 475 U.S. 157 (1986), the United States Supreme Court held that the
 22 right to the effective assistance of counsel is not violated by an attorney who refuses to cooperate
 23 in presenting perjured testimony. The Supreme Court rejected the defendant’s contention that his
 24 attorney’s conduct deprived him of the right to counsel, holding that “the right to counsel includes
 25 no right to have a lawyer who will cooperate with planned perjury.” *Id.* at 173. “Although counsel
 26 must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from
 27 taking steps or in any way assisting the client in presenting false evidence or otherwise violating the
 28 law.” *Id.* at 166. The Supreme Court also held that the right to testify does not include the right to

1 testify falsely. *Id.* at 173. As to what to do when confronted with a client who intends to commit
 2 perjury, nothing in *Nix* disapproved the “free narrative” approach, whereby an attorney declines to
 3 assist in the presentation of perjury by having the defendant testify in the narrative, as in the instant
 4 case. Indeed, the Supreme Court recognized that the “free narrative” approach has been approved
 5 by federal courts, including this Circuit. *Nix*, 475 U.S. at 170 n.6, (citing *Lowery v. Cardwell*, 575
 6 F.2d 727 (9th Cir. 1978)). *Nix* held that there was no ineffective assistance of counsel under the
 7 standard set forth in *Strickland v. Washington*, 466 U.S. at 687. *Nix*, 475 U.S. at 175.

8 Now, petitioner seeks an evidentiary hearing to show that “before trial” his trial counsel
 9 and defense investigator never “expressed to him” any doubt as to “petitioner’s story.” Pet’s. Req.
 10 for Evid. Hearing at p. 1. Petitioner also requests a hearing to demonstrate that trial counsel
 11 “possessed no evidence that Petitioner was being untruthful at any time.” Pet’s. Req. for Evid.
 12 Hearing at p. 3. However, petitioner demonstrates no factual dispute necessary to resolution of his
 13 claim and the state of the law is clear. There is no purpose for an evidentiary hearing because of the
 14 evidence in the record that counsel believed petitioner was going to commit perjury and the Supreme
 15 Court’s holding in *Nix* that counsel does not render ineffective assistance by refusing to cooperate
 16 in the presentation of perjury. An evidentiary hearing is not appropriate where there are no disputed
 17 material facts or where the claims present purely legal questions. See *Harris v. Pulley*, 885 F.2d
 18 1354, 1378 (9th Cir. 1988).

19 Petitioner also seeks an evidentiary hearing to show that he was “not informed” that his
 20 counsel would not make objections during petitioner’s cross examination. (Pet’s. Req. For Evid.
 21 Hearing at p. 4; see also Petition, Ground Two (petitioner’s claim of ineffective assistance of counsel
 22 with respect to cross-examination). Again, there is no need for an evidentiary hearing. In
 23 addressing petitioner’s legal claim, the state court of appeal applied the correct standard of
 24 *Strickland*, and held that in order to “establish prejudice” as a result of his attorney’s conduct during
 25 cross-examination petitioner must demonstrate a reasonable probability that he would have obtained
 26 a more favorable result had objections been made and sustained. Ex. 6, Appendix A at 31.

27 The Court of Appeal then examined the prosecutor’s cross-examination questions,
 28 petitioner’s answers, and any potential objections that might have been made (Ex. 6, Appendix A

1 at 31-43), and stated:

2 [W]e conclude that defendant has failed to demonstrate a reasonable
 3 probability that the jury would have returned a more favorable verdict on any
 4 charge or allegation had defense counsel objected to the prosecutor's questions
 whenever it was theoretically possible to do so, or had counsel raised a more
 5 general claim of prosecutorial misconduct. Simply put, as to those objections,
 both individually and collectively, counsel's omissions do not undermine our
 confidence in the jury's verdict. (*Strickland v. Washington, supra*, 466 U.S. at
 pp. 688, 694.)
 6

7 Ex. 6, Appendix A at 43.

8 As recently noted by the Supreme Court, “[i]n deciding whether to grant an evidentiary
 9 hearing, a federal court must consider whether such a hearing could enable an applicant to prove the
 10 petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.
 11 [Citation.] Because the deferential standards prescribed by § 2254 control whether to grant habeas
 12 relief, a federal court must take into account those standards in deciding whether an evidentiary
 13 hearing is appropriate.” *Schiro v. Landrigan*, ____ U.S. ___, 127 S.Ct. 1933, 1940 (2007)
 14 (emphasis added). “[I]f the record refutes the applicant's factual allegations or otherwise precludes
 15 habeas relief, a district court is not required to hold an evidentiary hearing.” *Id.* Here, no
 16 evidentiary hearing is required in order to conclude that the state court's decision was not based on
 17 an unreasonable determination of the facts in light of the evidence presented in the state court
 18 proceeding, and was not contrary to, or an unreasonable application of, clearly established federal
 19 law. *See* 28 U.S.C. § 2254(d)(1).

20 As to petitioner's remaining reason for requesting an evidentiary hearing, he contends that
 21 “many, “if not all witnesses were afraid to speak for any side, especially the defense because of
 22 allegations made by the D.A. in open court that Petitioner's P.I. Garry St. clair was involved in
 23 having witness[es] in petitioner's case shot at. . .” Req. for Evid. Hearing at p. 2. However,
 24 petitioner did not raise this claim in the state court or in the instant federal petition for writ of habeas
 25 corpus. Thus, petitioner cannot meet the standard for obtaining an evidentiary hearing set forth in
 26 28 U.S.C. § 2254(e)(2). If the prisoner fails to sufficiently develop the record, thus “himself or
 27 herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2)
 28 prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's

1 other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum
2 for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.”
3 *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Moreover, the record reflects that numerous
4 witnesses testified in both the prosecutor’s and the defense case. Petitioner’s conclusory allegations
5 of witness intimidation are simply lacking in the factual support necessary to establish a basis for
6 habeas relief.

7 In this case, petitioner has not made the required showing for an evidentiary hearing on
8 his claims.

9 **CONCLUSION**

10 For all the foregoing reasons, the request motion for an evidentiary hearing is without
11 merit and must be denied.

12 Dated: September 16, 2008

13 Respectfully submitted,

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28 Opp. To Petitioner’s Request For Evidentiary Hearing - *Horne v. Horel* - C 07-4592 SBA (PR)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Horne v. Horel**

No.: **C 07-4592 SBA (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 16, 2008, I served the attached **OPPOSITION TO PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Joseph Deonn Horne
V-84328
Ken Valley State Prison
P.O. Box 5102
Delano, CA 93216

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 16, 2008, at San Francisco, California.

Nelly Guerrero

Declarant

/S/ Nelly Guerrero

Signature